71-1552

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1972

NO._____

CARY L. HOOVER, ET AL,
PETITIONERS

v.

WYANDOTTE CHEMICALS CORPORATION,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

SAMUEL I. ROSENBERG
and
PATRICK M. REILY
of
POLACK, ROSENBERG & RITTENBERG
1006 Hibernia Bank Bldg.
New Orleans, La. 70112
COUNSEL FOR PETITIONERS

SAMUEL H. COLLINS
1030 Louisiana Ave.
New Orleans, La. 70115
OF COUNSEL

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WYANDOTTE CHEMICALS CORPORATION,
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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on February 25, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals below (Appendix A) is reported in 455 F.2d 387. The opinion of the District Court below was not reported.

JURISDICTION

The judgment of the Court below (Appendix A) was entered February 25, 1972. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED FOR REVIEW

The sole question presented for review is whether certain overtime activities required to be compensated for by the Fair Labor Standards Act as interpreted by the case of Steiner v. Mitchell, 350 U.S. 247, are excluded by the exemption of 29 U.S.C. 203(o) where there was no agreement reached in prior collective bargaining negotiations.

STATUTE INVOLVED

This case relates solely to an interpretation of 29 U.S.C. 203(o) as it relates to the undisputed facts on record in connection with the motion for summary judgment which was granted by the District Court in favor of Respondent.

STATEMENT OF THE CASE

This complaint was filed on behalf of petitioners seeking to recover from respondent unpaid overtime compensation, damages and attorney's fees under the provisions of the Fair Labor Standards Act, 29 U.S.C. 201 et seq.

The disputed time is that required for petitioners to change into specially provided protective clothing at the beginning of work and change out of their protective clothing and shower at the end of the workday. These activities are required by Respondent's rules, the protective clothing provided by Respondent and the activity takes place on Respondent's premises in an area provided solely for that purpose. Further, because of the nature of Respondent's business, these activities are essential to the other work petitioners perform, being necessary to prevent contamination from dangerous chemical substances.

Prior to 1968 the Respondent had paid fifteen minutes compensation for these activities. However, this practice was disputed by Petitioners' bargaining agent in negotiations preceding the 1968 bargaining contract. Negotiations on this subject ended unsuccessfully with the Respondent offering to pay twenty minutes compensation for the activity which was refused. Petitioners' bargaining agent informed Respondent that they would seek recourse other than a negotiated settlement and Respondent stated that it would review its policy in order to determine whether it would pay anything at all for such activity. No express provision relative to these activities was included in the 1968 collective bargaining agreement, but Respondent nevertheless continued to pay fifteen minutes compensation, rather than the twenty minutes compensation Respondent had offered to pay.

Petitioners filed their complaint on September 3, 1968 seeking compensation for the actual time expended in connection with these activities, which is alleged to be in excess of thirty minutes. The actual time involved was never a pertinent fact in the motion for summary judgment.

Respondent moved for summary judgment based on various affidavits supporting the undisputed fact that Respondent had paid fifteen minutes compensation since 1964.

Summary judgment in favor of Respondent was granted by the District Court, which judgment was affirmed by the Court of Appeals.

REASON FOR GRANTING THE WRIT

The decision of the Court of Appeals allows the unilateral action of an employer to form the basis of a defense to a suit brought to secure

rights granted by the Fair Labor Standards Act. Allowing such unilateral action to bring an employer within the exemption of 29 U.S.C. 203(o) while under the threat of such a suit would completely subvert the intent and effectiveness of the Fair Labor Standards Act. The application of 29 U.S.C. 203(o) presumes that the activity involved is principal activity and not preliminary or postliminary activity under the rule set forth in the case of Steiner v. Mitchell, 350 U.S. 247. The facts of the two cases are practically identical, except for the fact that in the Steiner case the defendant had never paid overtime for such activity as clothes changing and washing.

This Court considered the provisions of 29 U.S.C. 203(o) in the case of Steiner v. Mitchell, supra, and concluded that § 203(o) provided an exception to the general rule that rights under the Fair Labor Standards Act were not waivable by agreement. In the Steiner case the practice of the employer had been not to pay for such activities, but this Court stated at page 335:

> "In 1949, Section 3 (o) was added to the Act. Both sides apparently take comfort from it, but the position of the Government is strengthened by it since its clear implication is that clothes changing and washing, which are otherwise a part of the principal activity, may be expressly excluded from coverage by agreement." (Emphasis added.)

In considering the question raised by this case, it is necessary to look at the laws that existed prior to the enactment of Section 203 (o). Petitioners feel the law was consisely set forth

by this Court in the case of Jewell Ridge Coal Corp. v. Local 6167 United Mine Workers, 325 U. S. 161. In this case the custom and practice in the coal mining industry had existed for 50 years not to pay for any traveling time inside the portals of the mine. This Court said at page 167:

> "The Fair Labor Standards Act was not designed to codify or perpetuate those customs or contracts which allow an employer to claim all of an employee's time while compensating him only for part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of this basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive the employees of their statutory rights.
>
> * * *
>
> "This necessitates that the workweek be computed on the basis of the hours spent in actual work and compensation be paid accordingly. And even those employers who pay wages above the minimum and who maintain no substandard working conditions must respect this statutory pattern. Conversely, employees are not to be deprived of the benefits of the Act, simply because they are well paid, or because they are represented by strong bargaining agents."

The question here, simply put, is whether or not there was a custom or practice under the bona fide collective bargaining agreement of 1968 to pay fifteen minutes time for these activities. In

light of the negotiations prior to the 1968 contract it is plaintiffs' position that subsequent to the 1968 contract there was no such custom or practice.

Generally, customs and usages can obtain the force of law, but only under specific circumstances. The general law is set forth in 25 C.J.S., Customs and Usages, Section 2 at page 98 as follows:

> "A usage or custom must be ancient, certain and uniform, compulsory, consistent, generally continued, notorious, reasonable, not in contravention of law, and acquiesced in."

And further in Section 4 at page 101:

> "A custom or usage must be certain and uniform. A loose and variable practice, or an alleged usage which leaves some material element to the discretion of the individual, will not be allowed to control the rights of the parties."

Petitioners submit that in light of the negotiations for the 1968 agreement it is impossible for a custom or practice to exist under that agreement. Certainly Petitioners did not acquiesce in being paid fifteen minutes time when they were offered to be paid 20 minutes time for the same length and type of activity. Further, the Respondent claimed unto itself the discretion of changing the practice unilaterally upon its review of the situation. Both the employees and the company obviously anticipated that this matter would be adjudicated rather than settled by collective bargaining. Respondent, however, now

seeks to interpose the defense that their unilateral action of paying less than they had offered has the effect of estopping Petitioners from seeking their statutory rights.

Clearly, rights under the Fair Labor Standards Act cannot be waived in any manner, absent an express exemption in the act itself. The public policy supporting this rule was stated by this Court in the case of Brooklyn Savings Bank v. O'Neil, 324 U.S. 967 wherein this Court stated at page 901:

> "Where a private right is granted in the public interest to effectuate legislative policy, waiver of the right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy it was designed to effectuate."

Many exemptions from the Fair Labor Standards Act have been enacted, but it is well settled that these exemptions are to be narrowly construed. Mitchell v. Kentucky Finance Co., 359 U.S. 290. As was stated in the case of Shultz v. Louisiana Trailer Sales, Inc., 428 F.2d 61, (5th C.C.A.1970) at page 67:

> "Exemptions from the Fair Labor Standards Act are to be narrowly construed against the employer, upon which the burden rests to show that it comes within the exemption."

We submit that this matter cannot be viewed in a vacuum absent a realization of the practical aspects of the problem. We submit that under the decision of the Court of Appeals an employer can anticipate a situation such as exists in the instant case and defeat the policy pronounced in

the case of Steiner v. Mitchell in a number of ways. The employer can unilaterally pay fifteen minutes compensation for an activity it knows requires thirty minutes and thereby effectuate a savings of 50% on overtime pay. A somewhat smaller savings can be achieved by an employer anticipating the doctrine of de minimus non curat lex, and underpaying its employees just enough to bring the difference within the doctrine of de minimus. Petitioners contend that such ploys should not be allowed to thwart the intent of the Fair Labor Standards Act.

Petitioners contend that payment for such time as is sued for here is required by law, and that the statute solely provides that such rights may be negotiated away, or either diminished or destroyed by acquiescense in a custom or practice. It is not the law that such rights are those that must be won by negotiation in order to be preserved.

The decision of the Court of Appeals says the contrary. That, in effect, the employees must negotiate to get rights provided them by a statute. Certainly it could never be said that the employees must negotiate the payment of a minimum wage or lose their rights to sue when they are paid less. Such is clearly not the law. The only difference between the minimum wage requirements and the question here is that Congress has provided for the possibility that rights less than those given by the statute may be negotiated where the employees are reprepresented by a union, as they are here. This is an exception to the general rule that such rights may not be waived in any manner. The case therefore boils down to the question of whether or not the union did bargain away these rights in 1968. Remembering that the Respondent

offered twenty minutes pay which was refused by the union, how can it possibly be said that there was any tacit agreement to accept fifteen minutes pay, or to continue a custom or practice existing previously to pay only fifteen minutes time?

The case of Williams v. W. R. Grayson Co., 247 F.Supp. 433, (D.PA.1965), relied upon by Respondent, is clearly distinguishable from the instant case. In the Williams case there had been a custom and practice existing for some time as a result of the employees abandoning their claims to pay for clothes changing time. The custom and practice of not paying existed under the bargaining agreements of 1960 and 1962 and therefore payment for clothes changing time was said to be barred during the term of these contracts. The same might be said for the instant case for the period between 1964 and 1968. However, in the Willaims case, as here, the situation changed. The 1964 contract in Williams dealt expressly with the payment of such overtime activity. The result was that custom and practice barred an action prior to 1964 and the express terms of the contract brought the time within the exemption of § 203(o) after 1964.

In the instant case, in 1968 the union rejected the existing practice of paying fifteen minutes time and the company offered to increase the paid time five minutes to twenty minutes. This offer was rejected by the union as insufficient. The matter was dropped from negotiations and obviously there was no agreement, tacit or otherwise, to continue the existing practice. The Respondent even threatened to stop paying such time all together. Nevertheless, the Respondent continued to include the fifteen minutes in the pay time of the employees, and the Petitioners brought this suit well within the two year prescriptive period provided by 29 U.S.C. 255, as amended.

The other case relied upon by the Court of Appeals is that of Nardone v. General Motors, 207 F.Supp. 336 (D.N.J.1962). In Nardone the policy of General Motors had been consistent since 1946 not to pay for the time claimed. The court draws a clear inference that these activities were not principal activities under the rule in Steiner, saying:

> "If the activities were in fact necessary to perform the work there is strong reason to believe that the Union would have been able to secure payment through negotiation."

The Court began its summation by making the following pertinent observation:

> "There is some merit to plaintiffs' argument that there must be accord between management and labor since it would be manifestly erroneous to allow subversion of the Fair Labor Standards Act by not allowing benefits to employees because the Union could not get such recognition in its contract."

Having made such a correct and pertinent statement, however, we submit that the court then fell into error and nullified the effect of its remark, drawing a clear inference that it did not believe the activity to be principal activity under Steiner, saying:

> "If the activities were in fact necessary to perform the work there is strong reason to believe that the Union would have been able to secure payment through negotiation."

The Court says, in effect, that it will not allow subversion of the Fair Labor Standards Act, but that under the circumstances such subversion is impossible because of the "Court's strong reason to believe" that were the union justified in claiming such payment, the union would have secured the payment through negotiation. If Congress had intended otherwise, then certainly they would have clearly stated that payment for such time was not required when the employees are represented by a union. This is the effect of the interpretation in Nardone, but is clearly not the same as the allowance of waiver provided by 29 U.S.C. § 203(o).

Under the Nardone decision were the union unable to negotiate justificable claims they would have no recourse whatsoever to the courts, but would be forced to strike to obtain any rights whatsoever. Certainly, Congress could not have intended to promote such labor-management strife as a substitute for the orderly judicial determination of rights under the Fair Labor Standards Act.

It is submitted that the approach of the Court of Appeals disregards the general rule that rights acquired under the Fair Labor Standards Act are not to be waived even by express agreement, unless specifically provided in the act. Viewed in the historic context of the Fair Labor Standards Act it is hard to imagine that Congress intended to provide a general waiver of rights in regard to this specific type of activity, whereas before not even an express waiver would have been allowed under the rule stated in the case of Brooklyn Savings Bank v. O'Neil, supra. It is submitted that under 29 U.S.C. § 203(o) there must be some express or implied agreement between the parties either specifically in the collective bargaining

agreement or clearly indicated by the negotiations leading up to the confection of such a collective bargaining agreement. It is further submitted, that the employer should bear the burden of proving such an agreement.

Congress has provided a specific prescriptive period for this action in 29 U.S.C. § 255(a), which period is two years. This action was filed on September 3, 1969, less than two years from the date of the 1968 bargaining agreement. We contend that at the very least there has been no custom or practice under the collective bargaining agreement of 1968 and petitioners are entitled to recover from that date forward. As Congress has provided a specific statute of limitations for such action we submit that there can be no applicability of the doctrine of waiver, laches or estoppel that would cut short such a specific period. In contending that petitioners have allowed the establishment or continuation of the practice prior to 1968 by their failure to go on strike, or take immediate action, defendant is in fact attempting to assert a defense of waiver, laches or estoppel and the specific prescriptive period should be applicable to the exclusion of such a doctrine.

CONCLUSION

The decision of the Court of Appeals clearly conflicts with the pronouncements of this Court in the cases of Steiner v. Mitchell, supra, and Jewell Ridge Coal Co. v. Local 6167 United Mine Workers, supra, and allows an employer to thwart the legialative policy of the Fair Labor Standards Act by interpreting 29 U.S.C. § 203(o) in a manner contrary to the admonition of this Court in the

case of Brooklyn Savings Bank v. O'Neil, supra. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted:

By:_____

SAMUEL I. ROSENBERG
of
POLACK, ROSENBERG & RITTENBERG
1006 Hibernia Bank Bldg.
New Orleans, La. 70112
Telephone: 581-1422
ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I, Samuel I. Rosenberg, one of the attorneys for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of May, 1972, I served three copies of the foregoing petition for certiorari on Wyandotte Chemicals Corporation by mailing same, in a duly addressed envelope, with first class postage prepaid, to William R. D'Armond, Counsel for Respondent, at his offices 101 St. Ferdinand Street, Baton Rouge, Louisiana, 70801.

_____

SAMUEL I. ROSENBERG
Attorney for Petitioners
1006 Hibernia Bank Bldg.
New Orleans, La. 70112

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3017
Summary Calendar*

CARY L. HOOVER, ET AL,
Plaintiffs-Appellants,

versus

WYANDOTTE CHEMICALS CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(February 25, 1972)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

GOLDBERG, Circuit Judge: In the spring of 1964 defendant, Wyandotte Chemicals Corporation, was finalizing plans to initiate production at its G-2 chlorine plant in Geismar, Louisiana. Because of possible mercury contamination the company decided to require

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, 5 Cir. 1970, 431 F.2d 409, Part I.

various employees in the G-2 chlorine plant to change into work clothes before commencing work and to change clothes and shower at the end of their shift. In April of 1964, company representatives met with officials of the Oil, Chemical, and Atomic Workers International Union, which has at all relevant times represented all production and maintenance employees of the company, to discuss problems concerning the new plant. At that time the question of payment for the time to be spent in changing clothes and showering was raised by the union, but the company postponed discussion of the issue. One month later, as the company and the union initiated collective bargaining negotiations for a new labor contract, the defendant proposed that the operators involved be paid fifteen minutes overtime pay per day for the time spent changing clothes and showering. Though no express provision covering this matter was written into the labor contract, the system outlined by the company in negotiations was put into effect when the Geismar plant opened in July of 1964. When the 1964 collective bargaining agreement expired in 1966, the union made no attempt to change the company's practice concerning the time paid for clothes changing and showering, and the practice continued unaltered after a new labor contract was effectuated in 1966. Thereafter, in April, 1967, the defendant started up its new TDI plant at Geismar. Because the product of this new plant was poisonous, the company instituted the same clothes changing and showering policy that had been observed at the G-2 chlorine plant. While the union was aware of the introduction of this policy at the TDI plant, it never registered any objection to the company's appli-

cation of the fifteen-minute rule to the new facility. Then, in April, 1968, some three weeks prior to the 1968 contract negotiations, the union contended that the fifteen minutes pay was inadequate and requested that the company alter its policy and pay twenty-three to twenty-five minutes of overtime compensation. The company rejected the union's request, but it did offer to increase the pay from fifteen to twenty minutes per day. The union rejected this offer. Subsequently, the union and the company entered into a collective bargaining agreement, which contained no express provision covering employee compensation for clothes changing and showering. However, the company continued to pay fifteen minutes, and this policy has remained unchanged since that time.

After the 1968 negotiations terminated with the company's fifteen-minute policy still in existence, the plaintiffs, all of whom are production and maintenance employees at either the G-2 or TDI plant in Geismar, brought suit in federal district court, claiming overtime compensation, liquidated damages, and attorneys' fees under the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq. Essentially, plaintiffs claim that the time spent by them changing clothes and showering constitutes "hours worked" within the meaning of the Fair Labor Standards Act, and that they are entitled to compensation for the time spent in this regard, and not merely the amount of time that the defendant unilaterally assigns to complete this activity. The district court granted the defendant's motion for summary judgment and the plaintiffs appeal. We affirm.

Pervasive as the Fair Labor Standards Act is, its applicability is certainly not without exceptions. One of those exceptions embodied in the Portal-to-Portal Act, is as follows:

> "Hours Worked. — In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee."

29 U.S.C.A. § 203(o). Plaintiffs do not challenge the applicability of the above exception to the period between 1964 and 1968. In other words, they agree that prior to 1968 any time which the plaintiffs may have spent in excess of fifteen minutes per day to change clothes or to shower was excluded from working time by custom or practice under a collective bargaining agreement within the meaning of section 203(o).[1] However, the plaintiffs do insist that in light of the negotiations preceding the 1968 agreement the custom or practice ceased to exist under the 1968 collective bargaining contract. Thus, the plaintiffs assert that the union's

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[1]The parties in this case are in agreement that the activity engaged in by the plaintiffs at the defendant's plants is principal activity and not preliminary or postliminary activity under the rule established in Steiner v. Mitchell, 1955, 350 U.S. 247, 76 S.Ct. 330, 100 L.Ed. 267.

mere disavowal of the defendant's fifteen-minute policy in 1968 served to destroy the existence of any custom or practice, notwithstanding both the union's failure to press its demand to conclusion and the defendant's continuance of the fifteen-minute policy after the execution of the 1968 contract.

We are somewhat chagrined by the plaintiffs' assertion in this case. First, we find it difficult to conclude that the union's abandonment of its 1968 demand for twenty-three to twenty-five minutes of pay for clothes changing and showering did not amount to acquiescence in the defendant's long-standing fifteen-minute policy. More importantly, we think judicial approbation of the plaintiffs' position would constitute a holding that what a union fails to achieve through the process of collective bargaining will be delivered to it under the provisions of the Fair Labor Standards Act. The defendant in this case has shown a history of its dealings with the plaintiffs' union in exempting from payment any time exceeding fifteen minutes in which an employee spends changing clothes and showering. Furthermore, it has been shown that the collective bargaining negotiations between the union and the company encompassed the company's policy concerning payment for such activities. Against this factual background we consider it a logical interpretation of the Portal-to-Portal Act to conclude that section 203(o) precludes the plaintiffs from recovering overtime pay for any time exceeding fifteen minutes in which the plaintiffs were engaged in changing clothes or shower-

ing. *See Williams v. W. R. Grace & Co.*, E.D. Tenn. 1965, 247 F.Supp. 433; *Nardone v. General Motors, Inc.*, D. N.J. 1962, 207 F.Supp. 336.

We recognize that great homage is due the Fair Labor Standards Act because of its remedial scope and function. Accordingly, we skepticize regarding its exceptions. The Act, however, is not limitless. In full knowledge that the Fair Labor Standards Act has great length and breadth, we conclude in the instant case that its terrain is not universal. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

FILED
JUN 26 1972

IN THE

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OCTOBER TERM, 1972

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CARY L. HOOVER, ET AL,

Petitioners

versus

WYANDOTTE CHEMICALS CORPORATION,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM R. D'ARMOND
Sanders, Miller, Downing & Kean
Post Office Box 1588
Baton Rouge, Louisiana 70821

Attorney for Respondent,
Wyandotte Chemical Corporation

Franklin Press, Inc. Baton Rouge, La.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I. There is no conflict with the decisions of this Court.

The decision of the Court of Appeals does not conflict with *Steiner v. Mitchell*, 350 U.S. 247 (1956). *Steiner* held

that clothes change and clean up time is compensable under the Fair Labor Standards Act[1] where such activity is an "integral and indispensable part of the principal activities for which covered workmen are employed."[2] In *Steiner* there was no defense based on a custom or practice under a collective bargaining agreement, and the Court did not construe or apply Section 3(o) of the Fair Labor Standards Act. Respondent does not deny that the activity here in question is "principal activity" under the *Steiner* rule. Thus there is no *Steiner* issue in this case. Respondent's sole position for purposes of the present motion is that Section 3(o) applies. The Section 3(o) defense is not affected by *Steiner*. Indeed, Section 3(o) can only apply in cases where the time is otherwise compensable under *Steiner*, because where it is not compensable under *Steiner* there is no reason to reach the Section 3(o) issue. The Court in *Steiner* recognized that time spent in activities which are otherwise compensable "principal" activities under the Portal-to-Portal Act may be made noncompensable by Section 3(o):

> "In 1949, §3(o) was added to the Act. Both sides apparently take comfort from it, but the position of the Government is strengthened by it since its clear implication is that clothes changing and washing, which are otherwise a part of the principal activity, may be expressly excluded from coverage by agreement." [Emphasis added.] 350 U.S. at 254-255.

II. There is no conflict among the Circuits, and no important question of federal law is presented.

Section 3(o) was added to the Fair Labor Standards Act

1. 29 U.S.C.A. Sections 201 et seq.
2. 350 U.S. at 256.

in 1949. In its 23-year history Section 3(o) has been the subject of very little litigation and no judicial disagreement. The only other Court of Appeals decision we have found construing[3] Section 3(o) is another decision of the Fifth Circuit, which merely held that Section 3(o) was inapplicable where the employees were not represented by a labor union, since there could then be no custom or practice "under a bona fide collective bargaining agreement applicable to the particular employee." *Mitchell v. Southeastern Carbon Paper Co.*, 228 F.2d 934 (5th Cir. 1955).

Similarly, Section 3(o) has been the basis for decision in very few cases at the district court level. Two district courts have, in cases quite similar to the present one, applied Section 3(o) consistently with the decision of the Court of Appeals. *Williams v. W. R. Grace & Co.*, 247 F.Supp. 433 (E.D. Tenn. 1965); *Nardone v. General Motors, Inc.*, 207 F.Supp. 336 (D.N.J. 1962).

III. The decision of the Court of Appeals does not subvert the purposes of the Act.

Petitioners acknowledged that from 1964 until 1968 a custom or practice existed that would have barred the present action. Petitioners contend, however, that this custom or practice was terminated in the 1968 negotiations, in which the question of pay for clothes change and shower time was discussed. In those negotiations the union demanded 23 or 25

3. Section 3(o) was also cited, without forming the basis of the decision and without discussion, in *Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283 (5th Cir. 1969), cert. denied 397 U.S. 1040 (1970) and *Dunning v. Q. O. Ordnance Corp.*, 228 F.2d 929 (8th Cir. 1955), re-affirmed 233 F.2d 902 (8th Cir. 1956), cert. denied 352 U.S. 927 (1956).

minutes' pay, the company offered 20 minutes', and the union rejected this offer.

These proposals and counter-proposals were made in the give-and-take of collective bargaining, and like many such proposals resulted in no change in existing practice. When the negotiations were concluded, the 15-minute practice emerged unchanged and continued to be applied after the execution of the 1968 labor contract in June, 1968 and remained unchallenged for more than a year thereafter until the present action was filed in September, 1969. The mere unsuccessful attempt to negotiate more pay did not change or terminate the practice; on the contrary, the fact that the matter was an active issue in the negotiations leading up to the bargaining agreement is proof that the practice involved was one "under" the bargaining agreement. *Williams v. W. R. Grace & Co.*, supra; *Nardone v. General Motors, Inc.*, supra. The statutory test is whether a custom or practice existed. Here such a custom or practice did exist for 5 years before this action was commenced, and the fact of its existence is not altered by an unsuccessful attempt to modify it 4 years after it was established. The statutory ratification of custom and practice would be rendered virtually meaningless if Petitioners can nullify the custom and practice after it is firmly established merely by objecting to it.

Petitioners further argue that rights under the Fair Labor Standards Act cannot be "waived" and that to permit Respondent to "interpose" its own "unilateral action" would be tantamount to finding a waiver on the part of Petitioners. With all due respect, Petitioners are merely quarreling with the Congressional judgment expressed in Section 3(o). It serves no purpose to characterize Section 3(o) as a waiver provision.

Congress giveth, and Congress taketh away. Whatever the general waiver rules may be, Congress has declared that where employees are represented by a union which has negotiated a labor contract for them, time spent in changing clothes and washing is noncompensable if it is excluded from working time **either** by the express terms of the labor contract **or** by **custom or practice** under it. Here the 15-minute rule was in fact the established custom and practice for 5 years prior to the institution of this action, and that is all Congress has required.

Finally, Petitioners argue that the holding of the Court of Appeals opens the door for an employer to adopt "ploys" to "thwart the intent" of the Act by "unilaterally" paying for less time than it knows is required. If that possibility exists at all, it is not as a result of the holding of the Court of Appeals but as a result of the statute, and it is anamolous to suggest that the statute defeats its own purpose. Rather, the Act must be read as a whole, and Section 3(o) is of equal dignity as an expression of Congressional intent in the area to which it applies as any other section.

Furthermore, employees are not, as Petitioners suggest, required to negotiate for rights granted them by the Act in order to avoid becoming bound by a practice. They are only required to act timely, and to take steps to overturn the system before it has been in existence long enough to obtain the status of a "custom or practice." Among the alternatives available to employees (or their union) objecting to a method of compensation for clothes change and wash up time, as long as they act timely, are the rights to 1) file a grievance under the grievance and arbitration procedure of the labor contract, 2) file a complaint with the Wage-Hour Division of the U. S.

Department of Labor, and 3) file a lawsuit of the type filed here. All the statute prohibits is the course of action pursued by Petitioners here—taking no steps to object to the system when it is first instituted, but waiting until it has become established and then suing for back pay.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted:

William R. D'Armond
SANDERS, MILLER, DOWNING & KEAN
Post Office Box 1588
Baton Rouge, Louisiana 70821
Attorney for Respondent
Wyandotte Chemicals Corporation

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Respondent's Brief have been served on Petitioners by depositing the same in the United States Mail, postpaid, addressed to Petitioners' attorney of record, Mr. Samuel I. Rosenberg, Polack, Rosenberg & Rittenberg, 1006 Hibernia Bank Building, New Orleans, Louisiana 70112, on this 23rd day of June, 1972.

William R. D'Armond